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CHARLES ELMORE

In the Supreme Court of the United States

No. 362

OCTOBER TERM, 1937

THE CENTURY INDEMNITY COMPANY (a corporation),
Petitioner,

vs.

G. NELSON,
Respondent.

BRIEF FOR PETITIONER.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported as 90 F.(2d) 644.

JURISDICTION.

As stated in the petition for certiorari (p. 2), jurisdiction of this court was invoked under section 240(a) of the *Judicial Code* (U. S. C. 28: 347; 43 Stat. 938).

STATEMENT OF CASE.

The complaint in the District Court alleged that petitioner (defendant) was obligated to pay a judgment entered in a state court action, and assigned to respondent (plaintiff), under a bond or undertaking executed by petitioner to release an attachment levied in the state court action (R. 1-11). The answer denied liability, and averred specially that the real party plaintiff in interest was Fidelity and Casualty Company of New York, a corporation, which had obligated itself to pay and had paid the judgment in the state court action, under a bond or undertaking of similar character (R. 12-19).

The following undisputed facts were developed at the trial: On February 14, 1929, petitioner executed a bond or undertaking in the penal sum of $6000.00 to release an attachment levied on the property of defendants the San Francisco Iron & Metal Company, a corporation, H. Silberman, and L. Silberman, in a state court action entitled *"Berges v. Abraham, et al."* (R. 36-41). On February 26, 1929, Fidelity and Casualty Company of New York, a corporation, executed a bond or undertaking of similar character and amount to release the attachment levied on the property of defendant Abraham (R. 47-48). In the state court action plaintiff Berges recovered judgment on October 29, 1929, for the sum of $5643.65, interest and costs, against defendants Abraham, L. Silberman, and the San Francisco Iron & Metal Company (R. 41-42). The full amount of the judgment, with interest and

costs, was paid by Fidelity and Casualty Company of New York on February 21, 1930, but an assignment thereof was taken in the name of G. Nelson (R. 42). G. Nelson, the present respondent, was then a stenographer in the office of the attorneys for Fidelity and Casualty Company of New York, and the assignment was taken for its benefit (R. 100).

During the course of the trial in the District Court, the entire judgment roll in the state court action was admitted in evidence over the objection of petitioner, its position being that only the judgment was admissible (R. 58). Included in the said judgment roll, among the findings of fact, was a recital that the San Francisco Iron & Metal Company had assumed the obligations and liabilities of Abraham (R. 84-85). However, testimony at the trial given by one Silberman disclosed that an assumption of such character did not exist *inter sese* as to the defendants in the state court action (R. 122, 129).

Prior to the submission of the cause in the District Court both parties moved for judgment and requested findings (R. 130). The request was tacitly granted and so understood by the parties. Thereafter, the cause was orally argued and briefed (R. 130). Judgment was ordered for plaintiff (respondent) on May 31, 1934, "upon Findings of Fact and Conclusions of Law to be presented" (R. 21).

Pursuant to Rule 42 of the said District Court (R. 170), also quoted at page 5 of the petition for certiorari, special findings and conclusions were prepared and served by respondent on June 6, 1934 (R. 35-49),

and by petitioner on June 11, 1934 (R. 21-35). Those proposed by petitioner were rejected and refused. Those proposed by respondent were accepted and signed on June 16, 1934 (R. 49). Judgment against petitioner was entered the same day in the sum of $6000.00, interest from September 24, 1931, and costs (R. 50-51). An appeal from the judgment was allowed petitioner (R. 140).

In an opinion affirming the judgment on June 20, 1936, the Circuit Court of Appeals concluded that every assignment or specification of error made by petitioner was defective in form and ineffectual to evoke consideration (R. 151-164). It concluded that the trial had ended before the findings and conclusions were signed and, therefore, that the actions and rulings thereon were not open to review (R. 153-154). The opinion stated, however, that the judgment was not contrary to the law of the case established on a former appeal, because of the finding in the state court action that the San Francisco Iron & Metal Company had assumed the obligations of Abraham (R. 162). The opinion also stated that the judgment possessed evidentiary support even if the said finding in the state court action were disregarded, because Silberman had given similar testimony at the instant trial (R. 163-164). And the opinion further stated that the judgment was supported by the findings, because of a finding that the San Francisco Iron & Metal Company had assumed the obligations of Abraham (R. 162). Again, the opinion stated that the ruling admitting the entire judgment roll in the state court action was without error as that was the

proper way to prove the judgment (R. 162). And the opinion also stated that there was no occasion to notice plain error (R. 164).

The Circuit Court of Appeals granted a rehearing on August 17, 1936 (R. 145).

On June 7, 1937, the judgment was once more affirmed by a majority opinion entitled "Opinion as Amended" (R. 167-175). This majority opinion was based solely on procedural grounds and contained no reference to the merits of the appeal. There was a dissenting opinion reciting that failure to consider the merits of the appeal "cannot be said to be the search for justice for which the Federal Courts were created" (R. 176-181). While it is obvious that the opinion of June 7, 1937, entirely superseded the opinion of June 20, 1936, both opinions are nevertheless printed in the reports (90 F. (2d) 644). This situation has prompted respondent to assume that the two opinions are an entity forming the opinion in the cause, and that petitioner, like the author of the dissenting opinion, is in error in believing that the merits of the appeal passed unconsidered by the Circuit Court of Appeals (Bf. Resp. on Petition for Certiorari, pp. 17-18).

Petitioner is mindful of the rule that this Court, ordinarily, will only consider the specifications of error set forth in the petition for a writ of certiorari.

Helvering v. Taylor, 293 U. S. 507, 511.

But petitioner is also mindful of the rule that where the entire record is before this Court, authority is

present to direct such disposition of the cause as the Circuit Court of Appeals might have made upon the appeal from the District Court.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 567.

Therefore, petitioner has deemed it advisable and perhaps necessary to discuss the merits of the appeal and demonstrate that prejudice resulted from the procedural errors specified.

SPECIFICATION OF ERRORS.

1. The decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeals on matters of procedure.

2. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court in the matter of considering plain error.

ARGUMENT.

(1) THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS IN MATTERS OF PROCEDURE.

Herein the Circuit Court of Appeals held that the trial in the District Court ended on May 31, 1934, when the trial judge ordered judgment for plaintiff, and not on June 16, 1934, when he signed the findings and conclusions proposed and settled in accordance with the order of the court under its Rule 42. The holding was based on the decision of the same court in

Continental Nat'l Bank v. Nat'l City Bank of N. Y., 69 F.(2d) 312, 317 (R. 169-170).

Under said Rule 42 the order of May 31, 1934, was "merely a preliminary order for judgment" (R. 170). Consequently, a civil cause tried and determined by the court without the intervention of a jury is still in progress until findings and conclusions are proposed, settled, and signed under the Rule. In no respect, therefore, does the Rule transcend the statutory limitation imposed by section 700 of the Revised Statutes (28 U. S. C. A. 875).[1]

As early as 1869 the rule was announced that in such causes a trial is still in progress until the trial judge makes his formal findings and conclusion.

Clement v. Phoenix Insurance Co., Fed. Cas. No. 2882.

The rule still prevails according to the decisions of the Second and Eighth Circuits.

Thompson-Starrett Co. v. La Belle Iron Works (2 C. C. A.), 17 F.(2d) 536, 539;

United States Fidelity & G. Co. v. Board of Com'rs (8 C. C. A.), 145 F. 144, 151;

Mercantile Trust Co. v. Wood (8 C. C. A.), 60 F. 346, 348.

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1. Sec. 700, R. S. (28 U. S. C. A. 875): "When an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury, according to section 773 of this title (R. S. 649), the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

And confirmation of the rule is found in the decision of this Court in *Alexander v. Mackan,* 147 U. S. 72, saying that "if the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact, which has been established by uncontradicted evidence, * * * the question may be brought up for review in that particular".

In the *National Bank* case upon which the present decision is based Rule 42 was not involved or considered. And if the decision of the Circuit Court of Appeals for the Ninth Circuit in *Lando v. Equitable Life Ins. Co. of U. S.,* 84 F.(2d) 640, be taken as opposed to the decisions in the Second and Eighth Circuits then the latter decisions contain the better law and should receive the approval of this Court.

Demonstrable prejudice resulted from the holding of the Circuit Court of Appeals in the instant case that the trial had ended before the findings and conclusions were signed, and the refusal, based on such holding, to consider the assignments and specifications of error based on the actions and rulings of the trial court respecting the findings and conclusions.

It was the law of the case, established on the former appeal (*Nelson v. Century Indemnity Co.,* 65 F.(2d) 765) that the judgment in the state court action was satisfied by the payment thereof by Fidelity and Casualty Company of New York (or its nominee), except to the extent that a right to enforce contribution or reimbursement might exist under the doctrine of co-suretyship. The facts in the present case

precluded application of that doctrine; for the sureties had no common principal and no common obligation as each had executed a bond or undertaking to release the property of different principals.

21 *Ruling Case Law* 1131;
50 *Corpus Juris*, 278, 279, 287;
Stearns Law of Suretyship, 4th Ed., p. 478;
Spencer on Suretyship, sec. 150;
Arant on Suretyship (1931), sec. 75, p. 337.

Nowhere in the findings signed by the court does it appear that the sureties had a common principal or a common obligation (R. 35-49). The findings proposed by petitioner and rejected, and upon which assignments and specifications of error were based, recited the undisputed facts and disclosed that the doctrine of co-suretyship was inapplicable, a right to enforce contribution or reimbursement nonexistent (R. 30-35). If the proposed findings had been adopted the lack of evidentiary support for the judgment would have been unmistakable. Substantial prejudice therefore resulted by the refusal of the Circuit Court of Appeals to review the actions and rulings on the findings and conclusions.

(2) THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN THE MATTER OF CONSIDERING PLAIN ERROR.

(a) This court has held that a total absence of evidentiary support constitutes plain error.

Wiborg v. United States, 163 U. S. 632;
Clyatt v. United States, 197 U. S. 207.

There was a total absence of evidentiary support for the instant judgment. Respondent was the nominee of a surety which had paid a judgment and taken an assignment thereof. The judgment was accordingly satisfied except for the equitable purposes of contribution or reimbursement under subrogation.

California Civil Code, section 2847;[2]
California Civil Code, section 2848.[3]

The sureties herein involved were not co-sureties. Their principals were different, their obligations were different, their bonds or undertakings released different properties. The only competent evidence in the case showed that the judgment debt in the state court action was the personal obligation of defendant Abraham, and the Fidelity and Casualty Company of New York had alone bonded Abraham. Abraham, therefore, had no right to contribution or reimbursements from his co-defendants. And Abraham's surety stood on no better footing.

Underwood v. Metropolitan Nat. Bank, 144 U. S. 669;
Hamphill v. Mitchell (5 C. C. A.), 36 F.(2d) 233;

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2. Civ. Code, sec. 2847: "If a surety satisfies the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed, including necessary costs and expenses, but the surety has no claim for reimbursement against other persons, although they may have been benefited by his act, except as prescribed by the next section."

3. Civ. Code, sec. 2848: "A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended, and also to require all of his cosureties to contribute thereto, without regard to the order of time in which they became such."

U. S. v. National Surety Company, 298 F. 536;
March v. Barnet, 121 Cal. 419;
21 *Ruling Case Law* 313;
50 *Corpus Juris,* 529, 531;
60 *Corpus Juris,* 25.

The judgment clearly lacked evidentiary support and the Circuit Court of Appeals should have noticed "plain error" in that respect.

(b) This Court has also held that the failure to make a finding to support a judgment should be noticed as plain error.

Mahler v. Eby, 264 U. S. 32.

There is no finding in the record warranting a conclusion that the Fidelity and Casualty Company of New York (or its nominee) was entitled to contribution or reimbursement from petitioner. The findings are to the contrary. Findings II and III (R. 36) and finding XV (R. 47) are to the effect that the bonds or undertakings given by the respective sureties were for different principals, different obligations, different properties. The doctrine of co-suretyship was inapplicable; a right to enforce contribution or reimbursement did not exist. As the District Court made no finding to support the judgment, the Circuit Court of Appeals should have noticed plain error.

(c) Where, as in the present case, an appellee does not challenge the form of the assignments or specifications of error, it is the particular duty of an appellate court to notice plain error.

Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547.

In this connection it is said in the dissenting opinion in the present case:

> "The brief of the appellee meets the contention under this statement of the error with many pages of argument. What is important, is that appellee never then questioned that the court is sufficiently advised of the claimed merits of the appeal by the assignment of error which says that judgment is not sustained *either* by the evidence or by the findings. He did not only not raise any question as to the imperfection of the assignment, but he assumes, and, in effect, by his silence, admits it is good." (R. 176-177.)

(d) Plain error is always present where, as in the instant case, a judgment is contrary to the law of the case. In such cases the plain duty rests on a court of appeal to examine the record, after retrial, to see if the judgment works violence to the law of the case.

Continental Ins. Co. v. Reading, 259 U. S. 156;
In re Sanford Ford & Tool Co., 160 U. S. 431;
The Santa Maria, 10 Wheat. 431;
Mitchell v. United States, 15 Pet. 52.

On the former appeal, the Circuit Court of Appeals recognized the law that an assignment of a judgment to a third party carries with it the right to collect the full amount of the judgment from bonds or undertakings of the character involved. But the Court also recognized the rule that where the assignee is merely a nominee of a surety obligated to pay the judgment, the assignment merely carries with it a right to enforce contribution or reimbursement against co-sureties.

Nelson v. Century Indemnity Co. (9 C. C. A.), 65 F.(2d) 765, 767.

No findings were made in the trial court on the issues of contribution and reimbursement, although such were held necessary on the prior appeal and the proposed findings of petitioner were directed at that issue (R. 32-33). Nor did the trial judge make any conclusions respecting contribution or reimbursement (R. 49-50).

Under the authorities cited, a plain duty rested on the Circuit Court of Appeals to notice plain error.

(e) Where facts are not found to justify a judgment, plain error is always present and may not be ignored by an appellate court. The appellate court cannot supply findings: its duty is to reverse the judgment.

E. A. Packer (Steam Tug E. A. Packer v. New Jersey Lighterage Co.), 140 U. S. 360;
Preston v. Prather, 137 U. S. 604.

Previous arguments herein have demonstrated the applicability of the foregoing authorities.

(f) This Court has accorded a very broad meaning to the term "plain error".

Pierce v. United States, 255 U. S. 398;
Columbia Heights Realty Co. v. Rudolph, 217 U. S. 547.

In the category of plain error must be placed the ruling of the trial judge admitting in evidence the entire judgment roll in the state court action (R. 53, 58, 130).

While a judgment roll is admissible in support of a plea of *res judicata* or estoppel, the judgment itself

is alone admissible where proof of an assignment is necessary.

Fennell v. United States, 67 F.(2d) 768, 769.

There was no basis for a plea of *res judicata* or estoppel in the present case. The judgment in the state court action was not determinative of the rights *inter sese* between the co-defendants in a later action.

Victor Oil Co. v. Drum, 184 Cal. 226, 239;
34 *Corpus Juris,* 505, 984;
2 *Black on Judgments,* sec. 599.

The rights *inter sese* between the co-defendants in the state court action were immaterial issues therein, and were not decided by the judgment and the co-defendants were not estopped by any finding therein.

Chapman v. Hughes, 134 Cal. 641;
Bank of Visalia v. Smith, 146 Cal. 398;
2 *Black on Judgments,* sec. 617.

Solely upon a finding in the state court action to the effect that as to the plaintiff therein the San Francisco Iron & Metal Company had assumed the obligations of Abraham, the District Court found that petitioner was obligated to respondent (R. 46). But as the finding in the state court action was not binding on the co-defendants *inter sese,* it could not bind a surety of any defendant, and therefore the admission of the finding in evidence (included in the judgment roll) was erroneous. This incompetent evidence was in no way supplemented by competent evidence of similar import. On the contrary, the witness Silberman testified in the District Court (and there

was no other testimony on the subject) that while the judgment in the state court action reflected a claim for which the co-defendants were liable to the plaintiff therein, it also reflected a personal obligation of Abraham which his co-defendants, *inter sese,* had not assumed (R. 119-130).

The admission of this incompetent evidence was of pivotal importance, and its rejection would have deprived the respondent of all basis for the claim asserted. Under the guise of plain error it should have been noticed by the Circuit Court of Appeals regardless of any minor imperfections in the assignments or specifications of error respecting it.

CONCLUSION.

Petitioner therefore, respectfully submits that the judgment of the Circuit Court of Appeals should be reversed, with directions to the District Court to enter judgment for petitioner.

Dated, San Francisco, California,
December 6, 1937.

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G. NELSON,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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